

No. 4410

In the United States

Circuit Court of Appeals

For the Ninth Circuit 7

OLD COLONY TRUST COMPANY, a Corporation, THE FIRST NATIONAL BANK OF BOSTON, a National Banking Association, NATIONAL BANK OF COMMERCE IN NEW YORK, a National Banking Association, THE FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association, NATIONAL SHAWMUT BANK OF BOSTON, a National Banking Association, NATIONAL CITY BANK, a National Banking Association, and FIRST NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellants,

VS.

UNION LAND AND CATTLE COMPANY, a Corporation, W. T. Smith, as Receiver for said Union Land and Cattle Company, Under and by Virtue of that Certain Order Given and Made by the District Court for the District of Nevada, on July 28, 1920, SILVERIA GARAT, W. T. HITT, EMMA McLAUGHLIN, HENRIETTA MOFFAT, MAUD B. CLEMONS, FRANCES C. RICKEY, W. A. DILL, W. H. FRAZER, ELIZABETH SHARP, MRS. ALOYSIUS DAVEY, and J. W. DORSEY,

Appellees.

Petition for Re-Hearing

S. W. BELFORD,
GEORGE S. BROWN,
J. W. DORSEY,
W. E. CASHMAN.

Attorneys for Appellee

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Appellees.

Petition for Re-Hearing

Comes now W. T. Smith, as Receiver for said Union Land & Cattle Company, one of the appellees above-named, and respectfully petitions this

court to grant a re-hearing of said cause, for the following reasons, to-wit:

1.

In the opinion in this case reference is made to the opinion filed in this court in cases 4195-4196, and the order of the United States District Court, for the District of Nevada is reversed upon the ground that said order conflicts with the opinion of this court in said cases 4195 and 4196. In that opinion this court said:

“As already stated, the order authorizing the incurring of an indebtedness * * * seems inconsistent with a policy of speedy liquidation. **Such orders may have been justified in the earlier stages of the receivership**, but the time has arrived when there should be retrenchment instead of expansion.”

297 Fed. 353, 358.

The undisputed evidence in this case shows that the Receiver was appointed on July 28, 1920, and **that the contract in question was executed in June, 1922.** This was “in the earlier stages of the receivership,” and it was at a time when the Receiver was operating the property **with the consent of the appellants** as a going concern, under the original order of his appointment.

II.

The order appointing the Receiver contained the following direction, to-wit:

“Said Receiver is hereby authorized and empowered * * * to carry on the business of the defendant corporation according to the usual course of business of like character and to employ such employees, accountants, agents, assistants and attorneys as he may deem necessary and proper.”

(Page 263, Transcript of Record Case 4195.)

This order was entered with the consent of all the creditors, including the appellants here.

III.

Two payments had been made on the purchase price of the Leshler ranch before the failure of the creditors' agreement of 1923. Three payments, amounting to \$6,000.00, had been made on the purchase price of the Leshler Ranch **before the decision of this court ordering the liquidation of the property.**

IV.

The contract had been executed nearly two years prior to the decision of this court ordering the liquidation of the property.

V.

It is immaterial whether the first two payments were carried as "rent," or not. The undisputed testimony is that the contract was made in June, 1922, by an agent of the Receiver, for the benefit of the receivership itself.

VI.

The Lesher property has been used continuously by the Receiver from the date of the contract of purchase for the sole and exclusive purpose of protecting the livestock on the Spanish Ranch, which was a measure solely and exclusively for the benefit of the unsecured creditors. It had been so operated as an integral part of the Spanish Ranch.

VII.

The opinion and order of this court makes the Receiver responsible for at least three payments, amounting to the sum of \$6,000.00, when the undisputed evidence shows that all of these payments had been made prior to the decision of this court ordering the liquidation of the property.

VIII.

The court refers to the fact that the cattle company, before the receivership, "managed its busi-

nessness without buying the extensive acreage which the Receiver would now add to its properties." If that fact were at all material, the answer to it is found in the further fact that the cattle company, before the receivership, was unable to obtain title to the land, but it is not, in our opinion, a material factor, nor should it be so considered.

IX.

The court further held: "Even though the purchase of the land **might not be unwise from the general business stand-point of a concern to be kept going,**" etc. The undisputed testimony before the court shows that this land was purchased at a time when this concern was "**to be kept going.**" It should not, therefore, be regarded as an abuse of discretion to authorize the contract to purchase the land, when the contract was made at that time.

X.

The court has further found: "Upon no ground can we find sound reason for sustaining the order approving the action of the Receiver in purchasing the Lesher tract and paying \$10,000.00, or any sum therefor, out of the moneys of the cattle company."

In other words, notwithstanding the fact that

the ranch was purchased at a time when the Union Land & Cattle Company receivership was a going concern receivership, and, notwithstanding the fact that three payments were made prior to the order of this court for the liquidation of the property, the Receiver is not to be allowed anything on payments theretofore made.

XI.

The original order of the appointment of the Receiver contained ample authority for the purchase of the Leshner land and ample authority for making the payments on the purchase price of such lands, until modified by the decision of this court on April 7, 1924.

XII.

The undisputed testimony shows that there was no abuse of discretion in the District Court in authorizing the completion of a contract made when the Union Land & Cattle Company was operated as a going concern, for the following reasons:

A. The testimony before the court showed that, unless such land was purchased, the range used by the cattle would be seriously endangered and the cattle were the primary assets of the unsecured creditors.

B. That, at the time of the completion of the

purchase, competitive interests desiring the use of the Spanish Ranch range were seeking to purchase the Lesher tract.

C. That, after the use of this tract of land by the Receiver continuously from June, 1922, to the present time, the land could be sold for the purchase price thereof.

XIII.

In the opinion of the Receiver, the General Manager and the District Court, the liquidation of the Spanish Ranch, as directed by this court, could be better accomplished, and the land sold for a better price, if the Lesher tract were included therein.

XIV.

In the opinion of the Receiver, the General Manager and the District Court, it would be more difficult to find a purchaser for the Spanish Ranch, if the Lesher tract were in the possession of any competitive interest.

XV.

The undisputed evidence showed that there was no abuse of discretion on the part of the District Court, and that it had the right to exercise its best

judgment in this matter, and that it did so exercise it.

Very respectfully submitted,
S. W. BELFORD,
GEORGE S. BROWN,
J. W. DORSEY,
W. E. CASHMAN.
Attorneys for Appellee

I DO HEREBY CERTIFY that, in my judgment, the foregoing petition for re-hearing is well founded, and further certify that said petition is not interposed for delay.

Samuel Lord

Attorney for Appellee.